

MOFCOM Conditionally Approves Potash Merger

On June 2, 2011, China's Ministry of Commerce ("MOFCOM") cleared the merger of OAO Uralkali ("Uralkali") and OAO Silvinit ("Silvinit"), subject to conditions.¹ This is MOFCOM's first published merger decision in 2011. Since China's Anti-Monopoly Law (the "AML") entered into force, MOFCOM has imposed conditions on six deals and blocked one (Coca-Cola's purchase of Huiyuan).²

I. THE DECISION

The notified transaction involved the combination of two Russian potash producers, Uralkali and Silvinit (the "Parties"). MOFCOM's 30-day, Phase I review period began on March 14, 2011, and MOFCOM initiated an in-depth, Phase II review on April 12, 2011.

MOFCOM defined the relevant product market as potassium chloride (potash). The decision does not specify how MOFCOM defined the relevant geographic market, but it analyzed the effect of the transaction on worldwide and Chinese potassium chloride sales and on China's potassium chloride imports, both by land and sea.

In its competitive assessment, MOFCOM found that the merged firm likely would have the ability unilaterally to increase prices and that the transaction increased the likelihood of coordinated interaction between the merged firm and its rivals. Regarding unilateral effects, MOFCOM noted that the merged entity would be the second largest potassium chloride producer, with a global market share in excess of 33%. MOFCOM also found that China relies heavily on potassium chloride imports and that Silvinit and Uralkali account for over half of China's potassium chloride imports. MOFCOM determined that entry sufficient to offset any price increase would be difficult because potassium chloride reserves are owned by existing producers, and the exploitation of reserves, construction of new mines, and expansion of current facilities would be risky and expensive.

¹ The decision is available at <http://fldj.mofcom.gov.cn/aarticle/ztxx/201106/20110607583288.html>.

² These decisions are available at MOFCOM website <http://fldj.mofcom.gov.cn/ztxx/ztxx.html>.

Regarding coordinated effects, MOFCOM found that the merger could enhance the possibility of “coordinating production and sale among global suppliers of potassium chloride, which may have the effect of eliminating and restricting competition.” In support, MOFCOM noted that the transaction would result in a significant increase in market concentration and stated that the combined company’s share of supply, together with that of world’s largest supplier, amounts to approximately 70% of global volume.

II. THE REMEDY

To eliminate the anti-competitive effects of the merger, MOFCOM accepted the following conditions proposed by the Parties:

- The merged entity shall continue to trade potassium chloride directly with China and will use its best efforts to maintain a “steady” supply of potassium chloride products to China by rail and sea transportation.
- The merged entity shall supply “various and sufficient” potassium chloride products to China, including (white and pink) products containing 60% and 62% potassium oxide. In addition, as before, the merged entity shall provide sufficient products to Chinese customers to satisfy a variety of end uses (agriculture, industry, special industry, *etc*).
- The merged entity shall maintain regular negotiating procedures, including the negotiation of spot sales (by individual sale or monthly) and contractual sales (semi-annually or annually). Price negotiations should consider both past and current deals with Chinese customers as well as the “distinctiveness of the Chinese market”.
- Twice a year or upon the request of MOFCOM, the merged company shall report to MOFCOM regarding the performance of its commitments. The merged entity shall appoint a supervisory trustee to supervise the performance of its obligations. MOFCOM shall have the right to penalize any action that breaches the conditions.

Interestingly, MOFCOM's approach to remedies in this case is not based on MOFCOM's recently adopted rules on merger remedies, the Provisional Rules on Divestitures of Assets or Businesses to Implement Concentrations between Undertakings,³ which mainly address structural remedies. According to MOFCOM officials, new rules on remedies will be issued soon.

III. CONCLUSION

MOFCOM's decision is unclear regarding which theory of harm required the imposition of conditions, unilateral or coordinated effects. The 33% combined share cited by MOFCOM would likely not raise concerns about unilateral effects in many jurisdictions. Although the Parties' combined share of Chinese potash imports was over 50%, it would be unusual to define a relevant product market consisting solely of imports. In any case, the remedies imposed seem to reflect industrial policy concerns as much or more than competition concerns. For one thing, they specify potash types and end uses that do not correspond to the relevant product market definition. For another, they are very vague and, combined with the ongoing reporting and meeting requirements, will give MOFCOM considerable influence over the commercial behavior of the combined entity in China.

Interestingly, the Russian FAS also imposed behavioral conditions on this transaction in April 2011. For example, Uralkali has to develop and approve a marketing policy providing for regulation of its potash sales across various consumer categories in Russia (including agricultural producers, compound fertilizer manufacturers and trade customers) and consistent pricing practices applicable to each consumer group as well as other practices to enable potash shipments to domestic customers.⁴

³ They are the first rules specifically regulating divestiture remedies under the AML, but provide limited information on behavioral remedies. The rules were issued by MOFCOM on July 5, 2010, available at <http://fldj.mofcom.gov.cn/aarticle/zcfb/201007/20100707012000.html?2247447758=41285420>. For a more detailed review, please refer to our alert memorandum, available at http://www.cgsh.com/chinas_mofcom_issues_provisional_rules_on_divestiture_remedies/. MOFCOM has also issued Rules on the Examination of Concentrations between Undertakings, which are more general and classified different types of remedies and addressed the procedure for submitting remedies. These rules were issued by MOFCOM on November 27, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/c/200911/20091106639145.html?1760974030=41285420>. For a more detailed review, please refer to our alert memorandum, available at <http://www.cgsh.com/news/List.aspx?practice=2&geography=46>.

⁴ See Uralkali's News Release of April 4, 2011 "Federal Antimonopoly Service of Russia has approved the Proposed Combination of Uralkali and Silvinit", available at <http://www.uralkali.com/eng/media/news/detail.php?ID=2164>.

The Chinese approval of the Uralkali/Silvinit merger, as well as the Russian approval, highlights the flexible approach to antitrust remedies in countries with young antitrust regimes and the possibility for behavioral remedies to be used to achieve industrial policy goals as well as traditional antitrust goals.

* * *

If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Antitrust and Competition in the “Practices” section of our website at <http://www.clearygottlieb.com>.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

New York

One Liberty Plaza
New York, NY 10006-1470
1 212 225 2000
1 212 225 3999 Fax

Washington

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
1 202 974 1500
1 202 974 1999 Fax

Paris

12, rue de Tilsitt
75008 Paris, France
33 1 40 74 68 00
33 1 40 74 68 88 Fax

Brussels

Rue de la Loi 57
1040 Brussels, Belgium
32 2 287 2000
32 2 231 1661 Fax

London

City Place House
55 Basinghall Street
London EC2V 5EH, England
44 20 7614 2200
44 20 7600 1698 Fax

Moscow

Cleary Gottlieb Steen & Hamilton LLC*
Paveletskaya Square 2/3
Moscow, Russia 115054
7 495 660 8500
7 495 660 8505 Fax
* an affiliate of Cleary Gottlieb Steen & Hamilton LLP

Frankfurt

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
49 69 97103 0
49 69 97103 199 Fax

Cologne

Theodor-Heuss-Ring 9
50688 Cologne, Germany
49 221 80040 0
49 221 80040 199 Fax

Rome

Piazza di Spagna 15
00187 Rome, Italy
39 06 69 52 21
39 06 69 20 06 65 Fax

Milan

Via San Paolo 7
20121 Milan, Italy
39 02 72 60 81
39 02 86 98 44 40 Fax

Hong Kong

Bank of China Tower
One Garden Road
Hong Kong
852 2521 4122
852 2845 9026 Fax

Beijing

Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
86 10 5920 1000
86 10 5879 3902 Fax

Buenos Aires

CGSH International Legal
Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
54 11 5556 8900
54 11 5556 8999 Fax